

# OSTER

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INTERSTATE COMMERCE COMMISSION

March 23, 1988

Ms. Mildred Lee  
Recordations Unit  
Interstate Commerce Commission  
12th & Constitution Avenue, N.W.  
Washington, D.C. 20423

Dear Ms. Lee:

Enclosed is one original and one counterpart of a Railcar Operating Lease Agreement dated July 7, 1986, between the following parties:

Lessor: American Leasing Investors  
c/o Integrated Resources Equipment  
Group, Inc.  
733 Third Avenue  
New York, NY 10017

Lessee: Westmoreland Coal Sales Co.  
2500 Fidelity Building  
Philadelphia, PA 19109

The equipment involved in this transaction is as follows:

Equipment: 58, 3433 cf 100-ton Open-top Hoppers  
HLMX 7200-7232; 7237; 7533-7538;  
7540-7557

The filing fee of \$13 is enclosed. Thank you.

Sincerely,

*Mary Ann Oster*

Mary Ann Oster  
Research Consultant

Enclosure

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No.

Date MAR 23 1988

Fee \$ 13.00

ICC Washington, D.C.

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MOTOR OPERATING UNIT

INTERSTATE COMMERCE COMMISSION

RAILCAR OPERATING LEASE AGREEMENT

THIS AGREEMENT, made and entered into as of this 7th day of July, 1966, by and between American Leasing Investors, a California limited partnership, hereinafter called "Lessor", and Westmoreland Coal Sales Company, a Delaware Corporation, hereinafter called "Lessee".

1. Equipment and Lease Charges: Lessor agrees to furnish to the Lessee, and the Lessee agrees to accept and use, upon the terms and conditions herein set forth, the following described railcars (hereafter "Cars"), for the use of each of which the Lessee agrees to pay Lessor the following lease charges (hereafter "Lease Charges"):

| <u>Number of Cars</u> | <u>Description</u>   | <u>Lease Charges</u>   |
|-----------------------|--|--|
| 58                    | 3,433 cubic foot, 100 ton capacity open top hopper railcars, built in 1978.<br><br>HLMX 7200-7232<br>7237,<br>7533-7538<br>7540-7557 | Monthly lease rate per Car is _____ plus _____ per mile per Car for miles traversed in excess of 33,000 to 40,000 miles annually and _____ per mile, per Car for miles traversed in excess of 40,000 miles annually. |

Lease Charges shall become effective, with regard to each of the Cars, upon the date of the delivery and acceptance of each as hereafter provided in Article 2, and shall continue in effect, with regard to each of the Cars, until returned to Lessor at the end of the term of this Agreement, as hereafter provided in Article 5. Payment of Lease Charges shall be made to Lessor at the address specified in Article 16, or to such other place as Lessor may direct, on the fifteenth day of each month in arrears, with the first month's payment due on the fifteenth day of the month following the month the last Car is delivered as provided in Article 2 below. Lease Charges for any Car for any partial month shall be prorated on a daily basis. Any costs incurred by Lessor in collecting Lease Charges wrongfully withheld by Lessee, including reasonable attorney fees, will be paid by Lessee.

Lessee shall not be entitled to any abatement of rent, reduction thereof or set-off, counterclaim, recoupment or defense whatsoever, including, but not limited to, abatements, reductions, set-offs, counterclaims, recoupments or defenses due or alleged to be due by reason of any past, present or future claims of Lessee against Lessor or any other person for any reason whatsoever, except as otherwise provided in Articles 4, 6, and 9 below and except when Cars are improperly repaired by the Lessor;

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nor shall this Agreement terminate or the obligations of Lessee be otherwise affected by reason of any defect in the condition, design, operation or fitness for use of any Car or damage to or loss of possession or loss of use or destruction of all or any of such Cars from whatever cause and of whatever duration, except as otherwise provided in Articles 4 and 6 below, or the prohibition of or other restriction against Lessee's use of all or any such Cars, or the interference with such use by any person or entity or the invalidity or unenforceability or lack of due authorization of this Agreement or any insolvency of or the bankruptcy, reorganization or similar proceeding against Lessee.

Lessor covenants and warrants that it is the Owner of the Cars and that so long as Lessee is not in default hereunder, Lessee shall have and enjoy an unconditional right quietly to enjoy and use all Cars free from any disturbance or interruption of possession arising as a result of any action or inaction, failure of title, or conduct of or by Lessor, or any insolvency of or the bankruptcy, reorganization or similar proceeding against Lessor, or of or by any assignee of its rights hereunder.

2. Delivery of Cars: Each Car will be deemed to be delivered to Lessee when interchanged to the Lessee at Quinland, West Virginia. Lessor shall not be responsible for failure to deliver or delay in delivering any Car due to casualties, repair and any contingency beyond its control, including, but not limited to labor disputes, defaults and delays of carriers, and defaults and delays of the Lessee or any persons directing or controlling the Lessee. At the time of delivery and after expiration of the lease and redelivery of cars, representatives of the Lessor and the Lessee will perform and execute joint inspection reports covering the condition of the leased Cars.

3. Warranties and Representation: LESSOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND RESPECTING THE CARS WHETHER STATUTORY, WRITTEN, ORAL OR IMPLIED AND LESSOR HAS NOT MADE AND DOES NOT HEREBY MAKE, NOR SHALL IT BE DEEMED BY VIRTUE OF HAVING LEASED THE CARS PURSUANT TO THIS AGREEMENT TO HAVE MADE, ANY REPRESENTATION OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DESIGN OR CONDITION OF, OR AS TO THE QUALITY OF THE WORKMANSHIP IN, THE CARS, ALL OF WHICH ARE EXPRESSLY DISCLAIMED AND LESSOR SHALL NOT BE LIABLE, IN CONTRACT, TORT OR OTHERWISE, ON ACCOUNT OF ANY DEFECT, WHETHER HIDDEN, LATENT OR OTHERWISE DISCOVERABLE OR NONDISCOVERABLE RESPECTING ANY CARS, EXCEPT WHERE DAMAGE OR LIABILITY RESULTS FROM LESSOR'S NEGLIGENT REPAIR OF CARS. Lessor hereby assigns to Lessee for the term of this Lease the benefit of all warranties and indemnities of the manufacturer, reconditioner, repairer or maintainer of the Cars.

4. Responsibility for Damage or Destruction of Cars: If any of the Cars are lost, destroyed, or damaged beyond economic repair in the opinion of Lessee (except when the Car is in the

possession of Lessor), Lessee agrees to pay Lessor the settlement value of the Car computed under Rule 107 of the Interchange Rules adopted by the Association of American Railroads (hereafter "A.A.R. Code of Rules") within 30 days of such occurrence. Lease Charges with respect to any Car shall abate upon the date Lessor is advised that such Car has been lost, destroyed, or damaged beyond economic repair.

Upon payment by Lessee to Lessor of the settlement value of any Car as hereinabove provided, so long as Lessee is not in default hereunder, such Car and/or devices shall become the property of the Lessee. In order to facilitate the sale or other disposition of any Car which becomes Lessee's property as hereinbefore provided, Lessor shall, upon request of Lessee, execute and deliver to Lessee or to Lessee's vendee, assignee or nominee, a bill of sale for such Car, warranting title free and clear of all liens, security interests, and other encumbrances (except such as may have arisen by, through or under Lessee during the term of this Agreement) and such other documents as may be required to release such Car from the terms and scope of this Agreement and from any other lien or encumbrance of Lessor's making, undertaking or sufferance, in such forms as may be reasonably required by the Lessee.

5. Return of Cars: The Lessee agrees, immediately upon the expiration or termination of this Agreement without demand by Lessor, to return each of the Cars to Lessor uncontaminated and in the same condition as received, less reasonable wear and tear, and free of liens arising by, through or under Lessee, to an interchange point on the Chessie System Railroad, and to pay rent on each Car until such return. Rent for each Car shall cease when each such car is returned in the above condition to the point referenced above, or are placed in storage at the request of Lessor as stipulated below. Lessee shall use best efforts but is not obligated to provide up to sixty (60) days free storage for all or less than all Cars at the request of the Lessor at the expiration or termination of this Agreement. During such storage period all rent shall cease and Lessor will assume responsibility for the Cars during storage. Lessor will recall cars from storage all at the same time or in blocks of not less than a fixed number of cars.

6. Maintenance: (a) Lessor agrees to maintain at its own expense each of the Cars in good condition and repair, in conformity with all applicable laws and regulations including the A.A.R. Code of Rules and FRA Railroad Freight Car Safety Standards except for the following:

(1) Repairs or maintenance required as a result of damage caused by the Lessee, its agents, representatives, customers or independent contractors or any third party as prescribed in Rule 95, Section A of the Field Manual of AAR Interchange Rules; or

(ii) Repairs or maintenance required because of damage caused to the Cars by any corrosive or abrasive substance loaded therein or used in connection therewith; or

(iii) Repairs or maintenance required because of damage caused to the Cars by open flames, vibrators, sledges or other similar devices during loading or unloading operations; or

(iv) Repairs or maintenance required because of excessive or unbalanced loading.

(b) Lessee will make the Cars available to Lessor or its contractors at any facility specified by Lessor at any reasonable time on request for the purpose of maintenance inspection and to ensure regular maintenance or repairs. Lessee shall pay all transportation charges for moving any Car to the repair or inspection facility designated by Lessor if such facility is located on the lines of the CSX Rail System. Lessor shall pay the transportation charges to repair facilities located off the lines of CSX Rail System. Rent shall abate for any Car requiring repairs or inspection that are Lessor's responsibility after 72 hours of the date the Car is delivered to the repair or inspection facility designated by Lessor; rent shall resume as of the date that such Car is returned to the CSX Rail System in serviceable condition.

(c) In the case of damage caused to any of the Cars which is the responsibility under AAR Rules of a railroad and not repaired by such railroad, Lessor will perform the necessary repairs and will prepare and submit such documents as are necessary to recover the cost of such repair in accordance with AAR Rules and will perform all necessary administrative tasks in connection with such counterbilling. Lessor will be solely entitled to any sum so recovered.

(d) Lessee will, at Lessor's request, take such reasonable action as Lessor may specify to modify operating conditions within Lessee's control which in Lessor's reasonable opinion are causing undue and avoidable wear or damage to the Cars.

(e) Neither party to this Agreement will alter materially the physical structure or allow any third party to alter materially the physical structure of any of the Cars without the other party's written consent.

(f) Lessor reserves the right to retire any car that in its sole opinion it deems uneconomical to repair. Lessee's obligation to pay rent shall abate for any Car retired by Lessor as of the date on which it is retired or when such Car is delivered to Lessor's repair or inspection facility, whichever occurs first.

(g) Lessor acknowledges that, in connection with the discharge of Lessor's maintenance obligations hereunder, Lessor has

entered into or will enter into an Agency and Management Agreement ("Management Agreement") with Helm Financial Corporation in substantially the form annexed hereto. As collateral security, for the performance of its maintenance obligations under this Lease, Lessor hereby grants to Lessee a security interest in all of Lessor's right, title and interest in and to all funds from time to time on deposit in the Reserve Account (as defined in the Management Agreement), subject, however, to the terms and conditions of the Management Agreement. Lessor shall have full right, subject, however, to the terms and conditions of the Management Agreement, to use such Reserve Account funds, unless and until Lessee shall exercise its rights against such funds as set forth in Section 14 of this Lease. Nothing contained in this subsection (g) shall release or alter Lessor's maintenance duties under this Lease.

7. Freight and Other Charges: Lessor shall not be obligated for the payment of any switching, freight, or other charges incurred by the movement or the holding of the Cars, either loaded or empty, during the term of this Agreement, all of which, if incurred by Lessee's action, will be paid by Lessee. Lessor shall have no right or claim to any per diem, demurrage or other Car hire charges arising out of the use of the Cars and all such charges, as applicable, shall belong and be payable to Lessee.

8. Lettering of Cars: Lessor will supply reporting marks for the Cars in accordance with the A.A.R. Code of Rules as indicated in Exhibit A. Lessee agrees to keep and maintain on the sides of each Car in letters not less than one-half inch in height the words "OWNERSHIP SUBJECT TO A SECURITY AGREEMENT FILED WITH THE INTERSTATE COMMERCE COMMISSION".

9. Responsibility for Taxes: Lessor agrees to pay any personal property taxes associated with the Cars. So long as the Cars are utilized by Lessee in the carriage of cargos from Quinland, West Virginia to Newport News, Virginia for export, Lessor agrees to, and in all other circumstances, Lessee agrees to assume responsibility for, and to pay, all other taxes, costs, fines and assessments of every kind upon the Cars, and to file all reports relating thereto; provided, however, that Lessee shall not be responsible for federal or state taxes based upon the income of Lessor.

10. Responsibility for Lading: Lessor shall not be liable for any loss of, or damage to, commodities, or any part thereof, loaded or shipped in the cars, however such loss or damage shall be caused, or shall result, except if caused by Lessor's negligence. The Lessee agrees to assume responsibility for, and to indemnify Lessor against, and to save it harmless from, any such loss or damage or claim therefor.

11. Indemnification: To the extent that it has physical possession and can control use of the cars, each party hereto

agrees to indemnify and save the other party harmless from any and all claims, demands, causes of action, cost, and expenses, including attorney fees, arising directly or indirectly out of the use, custody, control, or operation of the Cars, whether in contract, tort, or otherwise, except in the case where a claim, demand, cause of action, cost and expense is caused by a person performing regular maintenance or repair of the Cars pursuant to Section 6, in which case Lessor agrees to make no claim against Lessee. In any personal injury action(s) arising from the operation of said Cars naming the other party as a defendant, each party agrees, except for losses caused by the acts or omissions of the other party, if the other party so requests, to undertake the defense and costs associated therewith immediately upon tender of said defense, including payment of any judgment directed against the other party jointly or severally. Each party also agrees to pay and indemnify the other party from any and all penalties, fines and levies arising from its operation of said Cars under this Agreement. Each party's obligations hereunder shall survive the termination of this Agreement.

12. Force Majeure: Neither party to this Lease shall be liable for nonperformance or delay in performance hereunder to the extent caused by unforeseen acts of God, government restraint, acts of the public enemy, civil commotion, strikes, nuclear or other disasters, labor disputes, labor or Material shortage, fire, explosion, flood or breakdown of or damage to plant, equipment or facilities (any of such events herein called "Force Majeure"). If affected by Force Majeure, the party so affected will give notice to the other party as promptly as practicable of the nature and expected duration of such Force Majeure. If, because of Force Majeure, either party hereto is prevented from carrying out any of its obligations under this Lease, then the obligations of such party shall be suspended to the extent made necessary by such Force Majeure. The party affected shall exercise all reasonable efforts to eliminate the effect of such Force Majeure as promptly as possible.

13. Assignment: Lessee, its parent or subsidiary companies shall be entitled to the possession and use of the Cars in accordance with the terms of this Agreement. Except as herein provided, neither Lessor nor Lessee will assign, transfer, encumber or otherwise dispose of this lease, the Cars or any part thereof, or sublet any car without the prior written consent of the other party. Lessee will not permit or suffer any encumbrances or liens to be entered or levied upon any Car, other than such as may arise by, through, or under Lessor or any assignee of Lessor's rights hereunder.

Lessee acknowledges and understands that Lessor may, without notice to Lessee, assign its interest under this Agreement and in and to the Cars to a bank or other lending institution as security for one or more loans. Lessee agrees, in the event of

any such assignment and upon notice thereof from Lessor, and only in the event of such assignment to one or more such assignees: (i) to recognize such assignment; (ii) to make all payments of Lease Charges and other amounts due under the Agreement as so assigned directly to the assignee identified in such notice or to its designee; (iii) to accept the directions or demands of such assignee in place of those of the Lessor; (iv) to surrender the Cars to such assignee upon termination of this Agreement; (v) that, in the event of such assignment and except as otherwise provided in Articles 4, 5, 6, or 9, Lessee's obligations hereunder with respect to payment of Lease Charges shall not be subject to any reduction, abatement, defense, set-off, counterclaim of recoupment for any reason whatsoever; (vi) except as otherwise provided in Articles 2, 4 (with respect to any Car which becomes Lessee's property), 5, 6, and Article 14, not to terminate this Agreement; provided, however, nothing contained in this Article 12 shall relieve Lessor from its obligations to Lessee hereunder, nor shall any assignee hereof be relieved of the obligation to release its interest in any Car to facilitate Lessor's obligations contained in the second paragraph of Article 4 hereof.

14. Remedies: If the Lessee after five business days notice shall fail to carry out and perform any of the obligations on its part to be performed under this Agreement, or if a petition, in bankruptcy, for reorganization, for a Trustee, or for a Receiver, shall be filed by the Lessee, or filed against the Lessee and not dismissed within 45 days, then, and in any of said events, Lessor shall have all rights available to it at law or in equity, including without limitation the right immediately to repossess the Cars, to remove the Cars from the Lessee's service, to terminate this Agreement pursuant to this Article 14, Lessee shall remain liable for all unpaid rent and other amounts due hereunder. The rights and remedies herein given to Lessor shall in no way limit its other rights and remedies give or provided by law or in equity. If Lessor after five (5) business days' notice shall fail to carry out and perform any of the obligations on its part to be performed under this Agreement, or if petition in bankruptcy, for reorganization, for a Trustee, or for a Receiver, shall be filed by or against the Lessor, then, and in any of said events, Lessee shall have the right to immediately terminate this Agreement and Lessee Charges hereunder shall cease, or, in the alternative, Lessee shall have the right to retain the Cars pursuant to this Lease and to take possession of all funds from time to time standing to the credit of the Lessor on deposit in the Reserve Account and deal with the same as if it were the Lessor, subject, however, to the terms and conditions of the Management Agreement, and for this purpose Lessor constitutes Lessee its Attorney-in-Fact to execute all endorsements and documents necessary or appropriate to be delivered to the depository bank. If Lessee shall terminate this Agreement pursuant to this Article 14, the rights and remedies herein given to Lessee shall



in no way limit its other rights or remedies given or provided by law or in equity.

15. Term of Agreement: This Agreement shall remain in full force and effect, with regard to each of the Cars, for a period of thirty-six (36) months from the average date of delivery of all of the Cars. Lessor shall advise Lessee of the average date of delivery of all of the Cars.

16. Notice: Any notice to be given under this Agreement shall be given by certified mail in the following manner:

(a) Notices from Lessor to Lessee shall be sent to:

Westmoreland Coal Sales Company  
2500 Fidelity Building  
Philadelphia, PA 19109  
Attention: Contract Administration

(b) Notices from Lessee to Lessor shall be sent to:

American Leasing Investors  
c/o Integrated Resources Equipment Group, Inc.  
733 Third Avenue  
New York, NY 10017  
Attention: Vice President - Administration

17. Compliance with Laws and Insurance Requirements: Lessee agrees that to the extent it has physical possession and can control use of the Cars, the Cars shall at all times be used and operated to the best of Lessee's knowledge under and in compliance with the laws of the jurisdiction in which the Cars may be located and in compliance with all lawful acts, rules, regulations and orders of any governmental bodies or officers having power to regulate or to supervise the use of such Cars, except that either Lessor or Lessee may in good faith and by appropriate proceeding, contest the application of any such act, rule, regulation or order in any reasonable manner at the expense of the contesting party. Lessee is a qualified self insurer of the risk and obligations assumed under this agreement and so long as Lessee claims so qualified, the provisions requiring insurance as set forth herein shall be waived.

18. Execution: This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute but one and the same contract. This Agreement may be signed in separate counterparts as long as each party hereto shall have signed at least one counterpart.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed and delivered that day and year first above written..

LESSOR:

AMERICAN LEASING INVESTORS By:  
ALI MANAGEMENT CORPORATION,  
Managing General Partner

ATTEST: Walter Hinton

By: M. Caryl McRee

Title: Senior Vice President

Date: July 29, 1986

LESSEE:

WESTMORELAND COAL SALES COMPANY

ATTEST: Betty Skew

By: [Signature]

Title: Vice President-Contract Administration

Date: July 25, 1986